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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 146

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA**

STATEMENT AS TO JURISDICTION

**A. A. CARMICHAEL,
M. R. NACHMAN,
RICHARD T. RIVES,**
Counsel for Appellants.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 645-N

SOUTHERN RAILWAY COMPANY, A CORPORATION,
Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, AS ITS PRESIDENT, JIMMY HITCHCOCK AND C. C. (JACK) OWEN, AS ASSOCIATE COMMISSIONERS, AND A. A. CARMICHAEL, AS ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Defendants

JURISDICTIONAL STATEMENT

Come the defendants Alabama Public Service Commission, Gordon Persons as its President, Jimmy Hitchcock and C. C. (Jack) Owen, as Associate Commissioners, and A. A. Carmichael, as Attorney General of the State of Alabama, pursuant to United States Supreme Court Rule 12, Paragraph 1, and file this, their statement of the basis upon which it is contended that the Supreme Court of the United States has appellate jurisdiction.

(a) The appeal herein is from the final decree made and entered by the District Court of the United States specially constituted under Title 28, Sections 2281 and 2284, United

States Code, and as provided in Section 1253, Title 28, United States Code, a direct appeal to the Supreme Court of the United States may be taken from the final decree made by such a specially constituted District Court. It is further provided by Title 28, Section 2101 (b) that such a direct appeal to the Supreme Court of the United States from such a final decree may be taken within sixty days.

(b) The statutes of the State, the validity of which are involved are Code of 1940, Title 48, Sections 35 and 106, each read as follows:

"Sec. 35 Abandonment of service, regulated—No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate."

"Section 106. *Permit to abandon service*—No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment."

(c) The final decree appealed from was made and entered on the 13th day of February, 1950.

(d) The application for appeal was presented on the 12th day of April, 1950.

(e) The final decree appealed from denied the motion of the defendants to dismiss the action, which motion to dismiss was based upon the ground that the Court judicially knows that Title 48, Sections 35 and 106 of the Code of Alabama 1940 are constitutionally valid, and on the further ground that it affirmatively appears from the complaint that the plaintiff Southern Railway Company has abandoned the operation of its passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Alabama-Mississippi state line enroute to and from Columbus, Mississippi without obtaining from the Alabama Public Service Commission a permit allowing such abandonment in violation of Sections 35 and 106 of Title 48 of the 1940 Code of Alabama; and in further violation of a lawful order of the Alabama Public Service Commission. The final decree appealed from also denied the motion of the defendants to stay any actions, orders or decrees under this complaint, pending the determination in the courts of the State of Alabama on the appeals which might be taken by the plaintiff from the orders and decrees of the Alabama Public Service Commission complained of in the complaint. The final decree appealed from permanently enjoined the defendants Alabama Public Service Commission, Gordon Persons, as its President, Jimmy Hitchcock and C. C. (Jack) Owen, as Associate Commissioners, and A. A. Carmichael, as Attorney General of the State of Alabama, and each of them, from enforcing the provisions of the orders of the Alabama Public Service Commission dated December 6, 1949 and January 9, 1950, or either of them, or from enforcing any penalties or other remedies against the plaintiff, its officers, agents or employees on account of the failure to observe the provisions and requirements of

the said orders, or either of them, by discontinuing and not restoring the operation of plaintiff's local passenger trains, Nos. 11 and 16 between Birmingham, Alabama, and the Alabama-Mississippi State line. It is from that final decree that this appeal is taken.

(f) The following decisions of this Court are believed to sustain jurisdiction of this appeal under United States Code Title 28, Section 1253:

R. R. Comm. of Texas v. Pullman Co. 312 U. S. 496,
61 S. Ct. 643.

R. R. Comm. of Cal. v. Pac. Coast Electric Co., 302
U. S. 388, 58 S. Ct. 334.

(g) The grounds upon which it is contended that the questions involved are substantial are briefly as follows:

(a) The statutory law in Alabama relating to the Public Service Commission and to the regulation of public utilities is contained in Title 48 of the 1940 Code of Alabama. By Section 18 of that title, the Public Service Commission is vested with general supervision of public utilities. Section 35 provides that no utility shall abandon any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, etc., not here involved, until written application is made to the Commission for the issuance of a certificate that the present or future public convenience or necessity permit such abandonment and until such certificate has been issued. Section 106 of said title is to like effect as Section 35, but directed particularly to transportation companies. The plaintiff Southern Railway Company suspended the operation of its trains Nos. 11 and 16 between Birmingham, Alabama and the Mississippi-Alabama state line enroute to and from Columbus, Mississippi, acting solely under the authority of Service Order No. 843 of the Inter-state Commerce Commission. The effective period of said service order

843 was terminated by order No. 843-A of the Interstate Commerce Commission effective as of 11:59 P.M. November 2, 1949. Prior to the termination of the effective period of the aforesaid Service Order No. 843 of the Interstate Commerce Commission, the Alabama Public Service Commission had notified the plaintiff Southern Railway Company, along with every other railroad company operating in the State of Alabama, that each and every train which might have been removed under the authority of said Service Order No. 843 should be restored to service within twenty-four hours after said order might be terminated. Also prior to the termination of the effective period of the aforesaid service order No. 843 of the Interstate Commerce Commission, the Alabama Public Service Commission had, on November 16, 1949, ordered a public hearing of the original petition of the plaintiff Southern Railway Company for authority to discontinue its said two passenger trains and of the supplemental petition of the plaintiff for authority to not restore the operation of said two trains, and notice of said hearing had been issued to said Southern Railway Company and to all interested parties, said petitions being set for a hearing in Fayette, Alabama, at the Fayette County Court House commencing at 9:00 A.M., Thursday, December 8, 1949. After such setting for hearing of said petitions, the complaint in this action was filed on the 6th day of December, 1949, and a temporary restraining order was issued, which temporary restraining order expressly permitted the defendants to proceed with such hearing set for December 8, 1949, at Fayette, Alabama, and such hearing was duly held at said time and place and resulted in the report and order of the Alabama Public Service Commission dated on the 9th day of January, 1950, denying the application of the Plaintiff Southern Railway Company for authority to discontinue the operation of its said two passenger trains Nos. 11 and 16 between Birmingham, Alabama, and Columbus, Mississippi, in so far as the same are operated in Alabama.

Section 29 of Title 48 of the 1940 Code of Alabama provides for an appeal from any final action or order of the Alabama Public Service Commission to the Circuit Court of Montgomery County, in Equity, and thence to the Supreme Court of Alabama.

Sections 81 and 84 of Title 48 of the 1940 Code of Alabama provide that on any such appeal the order or action appealed from may be stayed or superseded by the State Appellate Court or the Judge thereof upon hearing after consideration of the testimony taken before the Commission. Except in rate cases not here involved, such supersedeas may be ordered by said Court or Judge without the requirement of any supersedeas bond.

Section 82 of Title 48 of the 1940 Code of Alabama provides that the Appellate Court shall hear the case upon the certified record and shall set aside the order of the Alabama Public Service Commission if the Court finds that the Commission erred in the prejudice of appellant's substantial rights in its application of the law, or that the order was based upon a finding of facts contrary to the substantial weight of the evidence. That section has been broadly construed by the Alabama Supreme Court so as to afford due process under the Fourteenth Amendment to the Constitution of the United States and so as to require the Appellate Court, whenever confiscation is claimed, to review the orders of the Commission both as to the law and the facts, or the Court's own independent judgment.

Ala. Pub. Serv. Comm. v. So. Bell Tel. & Co., 42 So. 2d 655.

Ala. Pub. Serv. Comm. v. Mobile Gas Co., 213 Ala. 50, 104 So. 538.

The statutes of Alabama provide no means by which the Public Service Commission can issue process for the

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enforcement of its orders, but provide that the courts may compel compliance with the order of the Commission.

Code of Alabama 1940, Title 48, Sections 56 and 78.

The Alabama Supreme Court has held that the commission's orders may be enforced by the courts by the issuance of writs of mandamus.

Ala. Pub. Serv. Comm. v. W. U. Tel. Co., 208 Ala. 243, 94 So. 472.

The answer in this case takes issue that no criminal prosecution or civil penalties have been threatened against the plaintiff Southern Railway Company, and the most that the evidence discloses is that Alabama Public Service Commission has directed the plaintiff's attention to the provisions of the criminal statute to the effect that any utility which knowingly or willfully violates any lawful order of said Commission shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than \$1000.00 for each offense, and that each day's violation shall be deemed to be a separate offense.

Code of Ala. 1940, Title 48, Sec. 399.

The final decree of the three judge district court from which this appeal is taken is contrary to and in conflict with the following decisions of the Supreme Court of the United States.

Burford v. Sun Oil Co., 319 U. S. 315, 87 L. Ed. 1424;

R. R. Comm. of Texas v. Pullman Co., 312 U. S. 496, 51 S. Ct. 643;

Beal v. Missouri Pacific R. R. Co., 312 U. S. 45, 61 S. Ct. 418;

Chicago et als v. Fieldcrest Dairies, 316 U. S. 166, 62 S. Ct. 986;

See also *Moore's Commentary on the U. S. Judicial Code*, pp. 400 et seq;

54 *Harv. L. Rev.*, 1379.

The above cited authorities show clearly that where the state judicial process is by-passed in cases concerning the action of state administrative agencies, and where the action of those agencies is sought to be enjoined in Federal Courts, a substantial question involving conflicting state and federal interests is presented for this Court to consider on appeal.

(h) There is appended hereto a copy of the opinion of the three judge Federal Court delivered upon the rendering of the decree sought to be reviewed.

Respectfully submitted,

(S.) A. A. CARMICHAEL,
Atty. Gen. of Alabama.

(S.) M. R. NACHMAN,
Asst. Atty. Gen. of Ala.

(S.) RICHARD T. RIVES,
Of Counsel for Defense.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 645-N

SOUTHERN RAILWAY COMPANY, a Corporation, *Plaintiff*,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, its President, and JIMMY HITCHCOCK and C. C. (JACK) OWENS, Associate Commissioners; and A. A. CARMICHAEL, Attorney General of the State of Alabama, *Defendants*

Before Leon McCord, Circuit Judge, and John McDuffie and Charles B. Kennamer, District Judges

KENNAMER, *District Judge*:

Statement of the Case

Plaintiff, Southern Railway Company, a corporation, organized and existing under the laws of the State of Virginia, is engaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points in other States throughout the South.

The Defendant Alabama Public Service Commission, is an Administrative body, created under the laws of the State of Alabama, and authorized to exercise certain regulatory powers over the Plaintiff and other common carriers by railroad within the State of Alabama. (Title 48, Section 1, and Section 106, Code of Alabama, 1940.)

Plaintiff Railway, by complaint as amended, petitions this Court for injunctive relief to enjoin the Defendants, their agents, etc., from proceeding against the Plaintiff, its officers, etc., to enforce any penalties or other remedies provided by the laws of the State of Alabama, by reason of Plaintiff's failure to restore the operation of Trains Nos. 11 and 16, as required by order of the Defendant Commis-

sion of December 5, 1949, and as is inherent in the Commission's report and order of January 9, 1950.

The Defendants filed a motion to dismiss the bill of complaint as amended; a motion to stay the proceedings in this Court; and, without waiving any of these motions or the grounds thereof, an answer to the bill of complaint as amended.

The Court heard this cause, by consent of the parties Plaintiff and Defendants, on the Defendant's motion to dismiss, motion to stay the cause in this Court, and on Plaintiff's application for a temporary and permanent injunction, and on the merits of the bill and answer.

After the Court announced the cause would be so heard, the respective parties offered evidence, and at the conclusion of the taking of the evidence, oral arguments were heard by the Court and permission was given the parties to file written briefs with the Court within fifteen days, and the cause was taken under advisement by the Court.

Questions to be Determined by the Court

The main question raised by the motions to dismiss and stay, is, whether this Court should entertain this action at this time, irrespective of the impact the orders of the Commission had on the Plaintiff, or in spite of their questionable constitutionality.

The main question presented to this Court by the bill and answer is, whether the orders of the Defendant Commission of December 5, 1949 and January 9, 1950, is a violation of due process of law, as provided for by the 14th amendment to the Federal Constitution, and will result in an illegal confiscation of the Plaintiff's property.

Findings of Fact

1: Plaintiff Railway is a foreign corporation, organized and existing under the laws of the State of Virginia, is engaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points in other States throughout the South.

2. The jurisdictional amount of three thousand dollars, exclusive of interest, is involved. The bill of complaint, as

amended, contains allegations of denial of due process of law, as provided for by the 14th amendment to the Federal Constitution. The parties are properly before the Court and this Court has jurisdiction to hear and determine the issues involved. No suit is pending at this time in any of the Courts of the State of Alabama between the parties to this litigation, therefore, the rule of comity is not applicable.

3. Plaintiff Railway did, on September 13, 1948, file an application with the Defendant Commission for authority to discontinue operation in Alabama of Trains Nos. 11 and 16, as required by Sections 35 and 106 of the Code of Alabama, Title 48.

4. Plaintiff Railway did, on October 25, 1949, and in compliance with an order of the Interstate Commerce Commission made to effectuate a saving in the use of coal, discontinue operation of passenger Trains Nos. 11 and 16.

5. Plaintiff Railway did, on November 10, 1949, file a supplemental petition with the Defendant Commission for authority to be relieved of the necessity of restoring to operation Trains 11 and 16 within the State of Alabama.

6. The Interstate Commerce Commission did, on November 14, 1949, issue an order vacating and setting aside the order under which Plaintiff Railway had, on October 25, 1949, discontinued operation of Trains 11 and 16.

7. Plaintiff Railway did, on numerous occasions, after the filing of the original application with the Defendant Commission, and after the filing of the supplemental petition, make requests to the Commission for an opportunity to be heard on the original application and the supplemental petition, but were denied such a hearing by the Commission; the Commission stating that no such hearing would be held until the Trains had first been restored to service.

8. The Defendant Commission did, on December 5, 1949, enter an order requiring the Plaintiff to restore Trains 11 and 16 to service, and calling Plaintiff's attention to certain statutory penalties made and provided for in the event of a refusal.

9. Plaintiff Railway did, on December 6, 1949, file in this Court a bill for a temporary restraining order against the enforcement of the order of December 5, 1949, by the Commission. A temporary restraining order was granted by the Judge of this Court and the hearing on the bill for a temporary and permanent injunction was set for hearing before a three Judge Court for December 15, 1949, which hearing, at the request and consent of the Defendants, filed in this Court on December 14, 1949, was passed until the 9th day of January, 1950, and later, at their request and consent, to the 12th day of January, 1950.

10. The Defendant Commission did, on December 8, 1949, hold a hearing at the Court House at Fayette, Alabama, at which time the Plaintiff Railway was given an opportunity and did, present evidence and argument in support of the original application and supplemental petition.

11. The Defendant Commission did, on January 9, 1950, make and file a report and order denying the Plaintiff's original application and supplemental petition.

12. The Defendant Commission took no action on the original application, filed by the Plaintiff with the Commission on September 13, 1948, for authority to discontinue operation in Alabama of Trains 11 and 16, from the time the original application was filed until the trains were discontinued by order of the Interstate Commerce Commission on October 25, 1949.

13. That for a period of about fifteen months prior to the filing of the original application for authority to discontinue operation of trains 11 and 16, the expense of operation of these two trains exceeded the income derived from their operations by over four thousand dollars per month. This financial loss continued from the time the original application was made to the Commission until Trains 11 and 16 were discontinued on October 25, 1949.

14. That, in addition to Trains 11 and 16, Plaintiff Railway operated, and continues to operate Trains 12 and 15 between Birmingham, Alabama, and Columbus, Mississippi, which Trains 12 and 15, although mixed trains, carrying

both freight and passengers, has adequate facilities for hauling and handling the mail, and makes all regular and flag stops made by Trains 11 and 16. Train 15 is due to leave Birmingham daily at 7:15 a. m. and arrive in Columbus at 1:15 p. m. Train 16 is due to leave Columbus at 6:00 a. m. and arrive in Birmingham at 10:30 a. m. With the discontinuance of Trains 11 and 16, Plaintiff did not close, and does not threaten to close, any of the intermediate stations between Birmingham and Columbus.

15. That with the improvement made in highways, the use of privately owned automobiles, buses, trucks, vans, and other modes of conveyances, have increased, thereby causing a steady decline in the use of passenger trains by the traveling public, especially on short runs such as this one between Birmingham and Columbus, a distance of one hundred and twenty-two miles.

16. That the operation of mixed trains, such as Plaintiff's trains 12 and 15, now in daily service between Birmingham and Columbus, is adequate and sufficient to meet the demands and requirements of the public for railroad passenger service between these two points.

17. That, to require the Plaintiff Railway to continue the operation of Trains Nos. 11 and 16, at this heavy financial loss, which occurred over a long period of time before these trains were discontinued, and, by every prospect and likelihood, would continue should they be restored to service, is an unwarranted and illegal confiscation of Plaintiff's property.

Conclusions of Law

The Plaintiff, complaining of the constitutional invalidity of a state-made order, is held to the burden of showing that invalidity by convincing proof.

292 U. S. 290;

302 U. S. 305;

302 U. S. 388.

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. There must be

due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily.

227 U. S. 88;

298 U. S. 38;

301 U. S. 292.

When the Commission gives a fair hearing, received and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily, the requirements of procedural due process are met, and the question that remains for a federal court is not as to the mere correctness of the method and reasoning adopted by the regulating agency but whether the order will result in confiscation.

302 U. S. 388.

Opinion of the Court

When considered and weighed in connection with the fact that Plaintiff's application for permission to discontinue the two trains had been for about fifteen months on December 5, 1949, before the Commission, and no action whatever taken on the application; the position taken by the Commission that it would not hear nor consider the application until after the Plaintiff restored the two trains to service, irrespective of any great further loss and irreparable injury the Plaintiff would sustain in obeying the demand of the Commission in restoring the trains to service, the least the Commission could have done under the circumstances, in a proper spirit of fairness and justice, would have been to defer making its demand and calling the attention of the Plaintiff to the Alabama statutes providing for the heavy penalties Plaintiff would be subject to if it did not promptly comply with the Commission's order.

The manner of treating the application of the Plaintiff, then pending before the Commission, it appears to this Court, amounted to a threat on the part of the Commission to invoke the penalties provided for in the Alabama statutes against the Plaintiff.

This Court is of the opinion and so holds, that the motions to dismiss and stay should be, and are, denied and the relief as prayed for in the Plaintiff's bill of complaint as amended should be, and is, granted.

The Attorneys for the Plaintiff will prepare and present to the Court a proper decree in keeping with this findings and opinion.

This 6th day of February, 1950.

LEON McCORD,
U. S. Circuit Judge;

JOHN McDUFFIE,
U. S. District Judge;

CHARLES B. KENNAMER,
U. S. District Judge.

Filed Feb. 8, 1950.

O. D. STREET, JR.,
Clerk,

By ANNIE SCHOOLAR,
Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA, NORTH-
ERN DIVISION

Civil Action No. 645-N

SOUTHERN RAILWAY COMPANY, a Corporation, *Plaintiff,*

vs.

ALABAMA PUBLIC SERVICE COMMISSION, ET ALs., *Defendants*

Final Judgment or Decree

This cause coming on to be heard before a duly constituted Three Judge District Court and having been submitted by agreement of the parties for final decree upon the pleadings in the cause and upon the evidence offered herein, including a transcript of the testimony presented at the hearing before the defendant Alabama Public Service Commission at the court house at Fayette, Alabama on December 8, 1949, for the reasons set forth in the findings of fact, conclusions of law and the opinion of the Court filed herein, it is now

Ordered, Adjudged and Decreed this 13 day of February, 1950, as follows, viz:

(1) that the motions of the defendants to dismiss and to stay proceedings in this cause be denied;

(2) that the orders of the defendant Alabama Public Service Commission dated December 5, 1949 and January 9, 1950 be vacated and declared to be null, void and of no effect; and that a permanent injunction be issued enjoining the defendants Alabama Public Service Commission, Gordon Persons, its President, Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners, and A. A. Carmichael, Attorney General of the State of Alabama, and each of them, from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of said orders or of either of them or to enforce any penalties or other remedies against the plaintiff, its officers, agents or employees, on account of the failure to observe the provisions and requirements of the said orders or either of them by discontinuing and not restoring the operation of plaintiff's local passenger trains Nos. 11 and 16 between Birmingham, Alabama and the Alabama-Mississippi state line; and

(3) that the bond given by the plaintiff on the issuance of the restraining order herein, which by consent of the defendants was continued in force pending a decision of the cause, be discharged and that the plaintiff as principal and American Surety Company of New York as surety be discharged and relieved of any and all liability thereunder.

Leon McCord, United States Judge, Court of Appeals, Fifth Circuit; C. B. Kennamer, Judge, United States District Court, Middle District of Alabama; John McDuffie, Judge, United States District Court, Southern District of Alabama.

Filed Feb. 13, 1950. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy Clerk.